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No. 07-1242

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In The

Supreme Court of the United States

NELSON and JOAN FERNANDES,
Petitioner(s),

V.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Respondent(s).

On Petition for Writ of Certiorari
To The Appellate Division of New Jersey

PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Contents i
Table of Cited Authorities ii
This Petition for Rehearing Should be Granted..... 1
Sparta's Unconscionable Scheme..... 2
Abuse of Discretion by not Sua Sponte Raising Judicial Estoppel..... 8
Sparta's Judicial Estoppel Violations and Fraud Appears on the Face of the Orders 12
Petitioner's Independent Action..... 18
Facts Overlooked by the Appellate Division..... 20
Conclusions..... 23

TABLE OF CITED AUTHORITIES

28 U.S.C. §1257 2
U.S. Const., Fifth Amendment 3
U.S. Const., 14TH Amend., Sect. 1 3
N.J. Const., Article I - Rights & Privileges 3
Judicial Canons - Canon 1 ..... 7, 20
Canon 2 ..... 8, 15, 18, 20, 31
Canon 3 ..... 8, 20
Supreme Court - R.44.2 1

Federal Authorities

Asemani v. Attorney Gen. of the U.S., No. 03-4059, fn.5 (3d Cir. 2005) 17
Beall v. U.S., 467 F.3d 864 (5th Cir. 2006) 11
Berckeley Investment Group, Ltd. v. Colkitt, 455 F.3d 195 (3d Cir. 2006) 18
Bradford v. Wiggins, No. 06-4287 (10th Cir. 2008) 1
Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673 (U.S. 1930) 7
CAREY v. HOUSTON AND TEXAS CENTRAL RAILWAY CO., 161 U.S. 115 (U.S. 1896) 9
Cathcart v. Flagstar Corp., 155 F.3d 558 (4th Cir. 1998) 11
Construction Drilling, Inc. v. Chusid, 131 Fed.Appx. 366 (3d Cir. 05/11/2005) 16, 22
Demarco v. Ohio Decorative Prod., 19 F.3d 1432, fn.5 (6th Cir. 1994) 1
Roger Edwards, LLC v. Fiddes & Son Ltd., 427 F.3d 129 (1st Cir. 2005) 2
Grigson v. Creative Artists Agency, 210 F.3d 524 (5th Cir. 2000) 11
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 245 (1944) 2, 4, 6, 8, 9, 11
Heckler v. Community Health Services Crawford County, 467 U.S. 51, 60-61 (U.S. 1984) 3
In re Cassidy, 892 F.2d 637 (7th Cir. 1990) 11
McKnight v. Chicago Title Insurance Co., Inc., 358 F.3d 854 (11th Cir. 2004) 24
Philadelphia Reinsurance Corp. v. Employers Ins. of Wausau, 61 Fed.Appx. 816 (3d Cir. 2003) 18

Raquwl v. Education Management Corp., 196 F.3d 171 (3d Cir. 11/09/1999)..... 15
State of New Hampshire v. State of Maine, 532 U.S. 742 (U.S. 2001).....4, 10
Syvasky Lafayette Poyner v. Edward W. Murray, 113 S. Ct. 2397 (U.S. 1993)..... . 19
United States v. Parcel of Land and Residence at 18 Oakwood Street, 958 F.2d 1 (1st Cir. 1992). 3, 23
U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592 (Fed. Cir. 1995).....11

State Authorities

Bahrle v. Exxon Corp., 279 N.J. Super. 5, aff. 145 N.J. 144 (N.J. 1996).....8, 10, 13, 14
Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218 (N.J. 1998)..... 14
Hawkins v. Garden State Surgical Assoc., P.A., No. A-3952-06T3 (App.Div. 2008).....20, 21
In re Determination by Director of the Division of A.B.C., 921 A.2d 1159 (A.D. 2007)..... 17
In re Orthopedic "Bone Screw" Products Liability Litigation, 132 F.3d 152 (3d Cir. 1997)...18
Lanzet v. Greenberg, 126 N.J. 168 (1991) 10, 19, 28
Pleasantville Taxpayers v. City of Pleasantville, 111 N.J.Super. 377,381-382 aff. 115 N.J.Super. 85 (A.D. 1971) 16, 19, 21
Sisler v. Gannett Co., Inc., 222 N.J. Super. 153, 159 (A.D. 1987), c..d. 110 N.J. 304 (1988).....14
State, D.E.P. v. Fairweather, 298 N.J.Super. 421 (A.D. 1997)..... 9
State v. American Can Co., 42 N.J. 32 (N.J. 1964)..... 14
Velasquez v. Franz, 123 N.J. 498, 508 (N.J. 1991)..... 14
West Virginia Dep't of Transportation, Div. of Highways, A State Agency v. Robertson, 618 S.E.2d 506, (W.Va. 2005).....11

This Petition for Rehearing Should be Granted

This petition to rehear the denial of the petition for a writ of certiorari should be granted because "other substantial grounds not previously presented", ***Rule*** 44.2, will show the N.J. Appellate Division abused its discretion by affirming res judicata instead of sua sponte raising judicial estoppel.[1] Petitioner previously argued the Appellate Division refused to decide judicial estoppel after he raised that issue,[2] which overlooked its abuse of discretion by not sua sponte raising judicial estoppel. So, affirming res judicata was arbitrary, capricious or whimsical, and resulted in a manifestly

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[1] We review a judicial estoppel decision for abuse of discretion.*fn2 Eastman v. Union Pac. R.R. Co., 493F.3d 1151, 1156 (10th Cir. 2007). "A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." Id. ***Bradford v. Wiggins***, No. 06-4287 (10th Cir. 2008)

[2] "Even had defendants not raised the argument on appeal, we could sua sponte consider whether judicial estoppel is appropriate under the facts presented. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), cert. denied, 115 L. Ed. 2d 1078, 111 S. Ct. 2915 (1991) ("Because it is intended to protect the integrity of the judicial process, [judicial estoppel] is an equitable doctrine invoked by a court at its discretion.")" ***Demarco v. Ohio Decorative Prod.***, 19 F.3d 1432, fn.5 (6th Cir. 1994).

unreasonable judgment. So, petitioner did not meet the jurisdictional requirement of 28 U.S.C. §1257, which allows this Court to review a decision of the highest court in a state in which a decision could be had, which explains the denial of the Petition for Certiorari.

Sparta's Unconscionable Scheme

The following will show Sparta's attorney [3] deliberately planned and executed an unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter, which requires this Court to act when it finds a scheme to defraud the courts.[4] So, "freedom from estoppel" is "outweighed by the countervailing

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[3] "The cases have struggled, usually without great success, to provide a useful definition of "fraud on the court." One common version, drawn in part from language in Hazel-Atlas, refers to "an 'unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter' involving an officer of the court." Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 48 n.5 (1st Cir. 1995) (quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989))." ***Roger Edwards, LLC v. Fiddes & Son Ltd.***, 427 F.3d 129 (1st Cir. 2005).

[4] ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944). (This Court will act when it finds a deliberately and carefully executed scheme to defraud the courts).

interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government" since Sparta's fraud upon the court [5] involves an unconscionable plan or scheme that hampered petitioner's presentation of his claims on two separate occassions.[6] The attorney's scheme meets the three factors that "typically inform the decision whether to apply the doctrine (judicial estoppel) in a particular case." [7] Moreover, enforcing

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[5] ***Heckler v. Community Health Services Crawford County***, 467 U.S. 51, 60-61 (U.S. 1984) (freedom from estoppel can be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.)

[6] Cooper cannot obtain postjudgment relief based on allegations of "fraud on the court," unless he has "demonstrated, clearly and convincingly, that [the government] has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp.,892 F.2d 1115, 1118 (1st Cir. 1989). ***United States v. Parcel of Land and Residence at 18 Oakwood Street,*** 958 F.2d 1 (1st Cir. 1992)

[7] "Courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," Allen, 667 F. 2d, at 1166; accord Lowery v. Stovall, 92 F. 3d 219, 223 (CA4 1996); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F. 2d 208, 212 (CA1 1987). Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: **First, a party's later position must be "clearly inconsistent" with its earlier position.** United

the 7/21/04 judgment is manifestly unconscionable,[8] thus requiring that judgment and the 6/23/06 summary judgment order to be vacated.[9] The

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States v. Hook, 195 F. 3d 299, 306 (CA7 1999); In re Coastal Plains, Inc., 179 F. 3d 197, 206 (CA5 1999); Hossaini v. Western Mo. Medical Center, 140 F. 3d 1140, 1143 (CA8 1998); Maharaj v. Bankamerica Corp., 128 F. 3d 94, 98 (CA2 1997). **Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled,"** Edwards, 690 F. 2d, at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," United States v. C. I. T. Constr. Inc., 944 F. 2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See Hook, 195 F. 3d, at 306; Maharaj, 128 F. 3d, at 98; Konstantinidis, 626 F. 2d, at 939. **A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.** See Davis, 156 U. S., at 689; Philadelphia, W., & B. R. Co. v. Howard, 13 How. 307, 335-337 (1852); Scarano, 203 F. 2d, at 513 (judicial estoppel forbids use of "intentional self-contradiction ... as a means of obtaining unfair advantage"); see also 18 Wright §4477, p. 782." ***State of New Hampshire v. State of Maine***, 532 U.S. 742 (U.S. 2001). (emphasis added)

[8] Webster's defines "unconscionable" as "excessive;" "exorbitant;" "lying outside the limits of what is reasonable or acceptable;" "shockingly unfair, harsh, or unjust;" or "outrageous." Webster's Third New International Dictionary 2486 (1993).

[9] "Where enforcement of the judgment is "manifestly unconscionable," Pickford v. Talbott, 225 U.S. 651, 657, they have wielded the power without hesitation. ***HAZEL-ATLAS GLASS CO. v. HARTFORD-EMPIRE CO.***, 64 S. Ct. 997, 322 U.S. 238, 244-245 (U.S. 05/15/1944)

judicial estoppel violation resulted in the judge's dismissal for a lack of juridisdiction thereby denying petitioner's their right to be heard contrary to the unreversed 10/21/03 order, thus making the 7/21/04 judgment "manifestly unconscionable."

Sparta's attorney deliberately executed an unconscionable scheme by arguing exhaustion based on new theories that violate judicial estoppel which resulted in a dismissal for a lack of jurisdiction in the 7/21/04 judgment. That position runs contrary to his previously successful argument, which resulted in the court assuming jurisdiction and ordering a trial in its 10/21/03 summary judgment order. So, this judicial estoppel violation derived an unfair advantage because it caused the judge to end the trial thereby negating petitioner's testimony and his right to be heard after expressly stating the 10/21/03 order was correct, thus making his dismissal unconscionable.

Petitioner's independent action (P46-51) sought to have the 7/21/04 judgment set aside for fraud upon the court. Here again, Sparta's attorney violated judicial estoppel by taking a position contrary to his former successful exhaustion

argument by arguing the 7/21/04 dismissal for a lack of jurisdiction (P28-29) was a decision on the merits, in order to effect a res judicata dismissal. He did so, after admitting to arguing exhaustion in the former case, thus admitting his contrary successful position (P59). The trial court's 6/23/06 summary judgment order denied a recusal motion and found res judicata in Sparta's favor. Therefore, this second judicial estoppel violation derived an unfair advantage by resulting in res judicata though the former dismissal was for a lack of jurisdiction (P28-29). This shows the dismissal for exhaustion merely sought to end the trial so Sparta could subsequently violate judicial estoppel by arguing res judicata bar. Consequently, these judicial estoppel violations represent a fraud upon the court because they prevented petitioners from fully and fairly presenting both cases.

A review of the 7/21/04 judgment will show the trial judge never reconsidered his 10/21/03 order. So, the trial judge's lack of respect for the unreversed 10/21/03 order further makes his 7/21/04 judgment manifestly unconscionable. ***HAZEL-ATLAS GLASS CO. v. HARTFORD-EMPIRE CO.,*** 64 S. Ct. 997, 322 U.S. 238, 244-245 (U.S. 05/15/1944)

The first part of Sparta's scheme ended the trial for a lack of jurisdiction. Doing so deprived petitioner of his property "without its ever having had an opportunity to defend against the exaction" by retracting petitioner's right to be heard by means of a dismissal achieved by a fraud upon the court.[10] By following this dismissal with an advisory opinion and a dismissal with prejudice based on his advisory opinion, the judge set the stage for Sparta's subsequent res judicata argument and his res judicata ruling in order to prevent petitioner from being heard on his ***R***.4:50 motion in order to prevent the 7/21/04 judgment from being vacated.

Sparta's attorney's scheme "tampering with the administration of justice in the manner indisputably shown here involves far more than an

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[10] "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." ***Brinkerhoff-Faris Tr. & Sav. Co. v. Hill***, 281 U.S. 673 (U.S. 1930).

injury to a single litigant. It is a wrong against the institutions (courts) set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944).

Abuse of Discretion by not Sua Sponte Raising Judicial Estoppel

The holdings of ***Bahrle*** [11] as affirmed by the N.J. Supreme Court shows the Appellate Division sua sponte raised judicial estoppel to protect the integrity of the judicial process and admonished the

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[11] "Aside from the preclusive effect of the summary judgment orders, **Texaco should have been judicially estopped from raising its newly-found theory** against Exxon/Ritchie. See Levin v. Robinson, Wayne & LaSala,246 N.J. Super. 167, 179-80, 586 A.2d 1348 (Law Div. 1990) (judicial estoppel precludes a party from assuming a position in a legal proceeding totally inconsistent with the one previously asserted in the same or another proceeding). Judicial estoppel is a principle of equity, but unlike equitable estoppel it "looks to the connection between the litigant and the judicial system" rather than the relationship between the parties. Oneida Motor Freight, Inc. v. United Jersey Bank,848 F.2d 414, 419 (3rd Cir.), cert. denied, 488 U.S. 967, 109 S. Ct. 495, 102 L. Ed. 2d 532 (1988). Its fundamental premise is to protect the integrity of the judicial system by preventing litigants from "'playing fast and loose'" with the court "to suit the exigencies of self interest." ***Bahrle v. Exxon Corp.***, 279 N.J. Super. 5, aff. 145 N.J. 144 (N.J. 1996). (emphasis added)

trial judge for allowing new theories. A year later, the Appellate Division found judicial estoppel also applies to the state in a taking's case for failing to act forthrightly.[12] So, judicial estoppel in New Jersey, was taking action with respect that part of ***Hazel-Atlas*** that held "the public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hence, the Appellate Division's failure to sua sponte raise judicial estoppel to protect the integrity of the judicial process in the face of two blatant violations was an abuse of discretion.

Petitioner's independent action sought to have the 7/21/04 judgment set aside because it openly states a position contrary to the unreversed 10/21/03 summary judgment order. Hence, it is a continuation of the former proceeding.[13] Therefore, the trial judge

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[12] "Judicial estoppel prevents the State from taking a different position at trial concerning the value of the property from that which it had assumed when it made its offers and deposited with the court clerk what it considered to be the property's fair market value." ***State, D.E.P. v. Fairweather***, 298 N.J.Super. 421 (A.D. 1997)

[13] ***CAREY v. HOUSTON AND TEXAS CENTRAL RAILWAY CO.***, 161 U.S. 115, 128 (U.S. 1896) (this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law).

and the Appellate Division's failure to consider these orders on their face were an abuse of discretion.

The holdings of ***Bahrle*** further shows the Appellate Division relied on a 3 rd. Circuit judicial estoppel ruling. Hence, the Appellate Division's refusal to sua sponte raise judicial estoppel after petitioner brought it to their attention was an abuse of discretion that supports the inference that it tacitly approved judicial estoppel to terminate petitioner's right to be heard and to end their inverse condemnation action. The Appellate Division also failed to review the denial of the recusal motion for an abuse of discretion, which supports the inference that it avoided this issue because the judge's conduct proves a deliberate abuse of discretion with respect to his duty to sua sponte raise judicial estoppel. So, the New Jersey courts have decided an important federal question in a way that conflicts with two relevant New Jersey decisions and two relevant decisions of this Court by failing to sua sponte raise judicial estoppel to protect the integrity of the judicial process. ***State of N.H. v. State of Maine***, 532 U.S. 742 (U.S. 2001) (judicial estoppel, "generally prevents a party from prevailing in one

phase of a case on an argument and then relying on a contradictory argument to prevail in another phase . . . other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process"). Especially when a fraud upon the court is involved.[14]

Petitioner also raised question 6 to have this Court decide "an important question of federal law that has not been, but should be, settled by this Court" since at least four circuits can sua sponte raise judicial estoppel.[15] Why should petitioner have to prove New Jersey's courts abused its discretion by not sua sponte raising judicial estoppel to protect the integrity of the judicial process since finding a judicial estoppel violation would prove they abused their discretion.

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[14] ***Hazel-Atlas Glass Co. v. Hartford Empire Co.***, 322 U.S. 238, 245 (1944).

[15] "This court may raise judicial estoppel sua sponte in "especially egregious case[s] wherein a party has successfully asserted a directly contrary position." ***Beall v. U.S.***, 467 F.3d 864 (5th Cir. 2006); ***Grigson v. Creative Artists Agency***, 210 F.3d 524 (5th Cir. 2000); ***U.S. Philips Corp. v. Sears Roebuck & Co.***, 55 F.3d 592 (Fed. Cir. 1995); ***In re Cassidy***, 892 F.2d 637 (7th Cir. 1990);] ***Cathcart v. Flagstar Corp.***, 155 F.3d 558 (4th Cir. 1998); ***West Virginia Dep't of Transportation, Div. of Highways, A State Agency v. Robertson***, 618 S.E.2d 506, 217 W.Va. 497 (W.Va. 2005).

Sparta's Judicial Estoppel Violations and Fraud Appears on the Face of the Orders

On its face, the unreversed 10/21/03 summary judgment order shows the court assumed jurisdiction and ordered a trial [16] because Sparta successfully argued the court had jurisdiction since the SDWA did not statutorily apply to petitioner's lot. [17] The 10/21/03 summary judgment order became the law of the case, ***Lanzet v. Greenberg***, 126 N.J. 168 (1991) (Summary judgment orders are the "law-of-the-case"); ***Castellano v. Fragozo***, 311 F.3d 689 (5th Cir. 11/20/2002) (law of the case established by summary judgment).

On its face, the 7/21/04 judgment shows the judge dismissed petitioner's complaint for a lack of jurisdiction proving Sparta contradicted its former successful position by arguing petitioner failed to exhaust SDWA administrative remedies and other

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[16] "4. Trial is scheduled for January 12, 2004. " (P13)

[17] "2. Defendants' cross-motion for summary judgment is granted, limited to and only to the extent that the Court finds that the ***New Jersey Safe drinking Water Act***, including, but not limited to N.J.A.C. 7:10-11.1, does not statutorily apply, retroactively or otherwise, to defendants' well located on plaintiffs' property." (P13)

new found theories. Hence, the trial judge abused his discretion by not sua sponte raising judicial estoppel pursuant to ***Bahrle,*** since new theories are barred by judicial estoppel.[18] Therefore, the dismissal for a lack of jurisdiction[19] represents a ruling contrary to the law of the unreversed 10/21/03 summary judgment order which implicitly found the court had

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[18] **(Texaco should have been judicially estopped from raising its newly-found theory)** ***Bahrle v. Exxon Corp.***, 279 N.J. Super. 5, aff. 145 N.J. 144 (N.J. 1996). (emphasis added)

[19] "In this regard, R.4:69-5 provides that "except where it is manifest that the interest of justice requires otherwise, actions in lieu of prerogative writs shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." The reason for the rule is to allow administrative bodies to perform their statutory functions and resolve factual issues in their area of expertise. **The doctrine of exhaustion of remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that they would have to resolve the SDWA fifty foot radius issue before a building permit issued and when advised by the Township Manager that the Township would be flexible.** Instead plaintiffs chose to file suit without pursuing an application for subdivision and/or site plan approval or appeal to the County Construction Board of Appeals on the issue of a building permit for a residence on the lot. See 41 Maple Assoc. v. Common Council, 276 NJS 613, 619 (App. Div. 1994) (Emphasis Added) " (P28-29) (emphasis added)

jurisdiction thereby prejudicing petitioner's right to the trial that remains ordered. Moreover, a dismissal for a lack of jurisdiction is not a dismissal on the merits.[20] Hence, the judge did not respect the law of the case, as required.[21] So, ending the trial and dismissing for exhaustion in the face of the unreversed 10/21/03 summary judgment order usurps the law of the case.[22] Since, ***Bahrle*** relies on a 3 rd. Circuit ruling the following law is helpful. Sparta's attorney admits to arguing exhaustion in a trial brief. [23] This admission shows Sparta's judicial

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[20] "[U]nless the order otherwise specifies, a[n] [involuntary] dismissal . . . other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits." ***Velasquez v. Franz***, 123 N.J. 498, 508 (N.J. 1991); ***Alan J. Cornblatt, P.A. v. Barow***, 153 N.J. 218, (N.J. 1998) (same).

[21] ***Sisler v. Gannett Co., Inc.***, 222 N.J. Super. 153, 159 (A.D. 1987), cert. den. 110 N.J. 304 (1988) ("judges are required to respect unreversed decisions made during the trial . . unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous.")

[22] As Professor Moore has pointed out, policy considerations strongly dictate that the concept of void judgments be restricted and that unappealed civil judgments not be dealt with as void except where there has been a plain usurpation of power. ***State v. American Can Co.***, 42 N.J. 32 (N.J. 1964).

[23] "Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." (P59)

estoppel violation caused the judge to violate the two prudential considerations in the law of ***Raquwl*** by not requiring a separate hearing. [24] As to the first, the judge did not reconsider the 10/21/03 summary judgment order. To the contrary, his 7/21/04 judgment expressly states the SDWA does not apply. [25] The judge also refers to an NJDEP letter to show it would not apply the SDWA to petitioner's lot.[26] Hence, the 10/21/03 order still applies. As to the second consideration, by dismissing the complaint after the trial instead of calling for a hearing before the trial, the judge took no appropriate steps so

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[24] Although a trial Judge has the power to reconsider an earlier decision, its authority to do so is limited by two prudential considerations: "First, the court must explain on the record the reasoning behind its decision to reconsider the prior ruling. Second, the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." Williams, 130 F.3d at 573. ***Raquwl v. Education Management Corp.***, 196 F.3d 171 (3d Cir. 11/09/1999)

[25] "The Court, in the course of this litigation by Order of October 21, 2003, determined that the SDWA 50 foot radius requirement applied rather to new or modified well water systems and not existing wells as in the case of plaintiffs' well." (P23)

[26] "Also in the course of this litigation, through motion practice, the State of New Jersey Dept. of Environmental Protection has confirmed by letter dated October 16, 2003 that the SDWA 50 foot radius requirement would not be applied." (P23)

petitioners were not prejudiced by their reliance on the 10/21/03 order. Failing on these two points shows the judge did not reconsider his 10/21/03 order. Hence, the judge's dismissal in the face of the unreversed 10/21/03 order shows the judge knew he was denying petitioners due process, which renders the 7/21/04 judgment void. ***Construction Drilling, Inc. v. Chusi.*** So, the 7/21/04 judgment and the 6/23/06 summary judgment order are unconscionable since the 10/21/03 order continues to represent the law of the case based on the judge's own findings. More importantly, the foregoing conduct by the judge is the direct result of Sparta's attorney's fraud upon the court. Had the judge sua sponte raised judicial estoppel he would have protected the integrity of the judicial process and prevented the fraud on the court.

The 7/21/04 judgment shows the judge states the 10/21/03 order still applies, then dismisses the complaint for a lack of jurisdiction, which proves a bias in Sparta' s favor. So, the judge was "without jurisdiction to entertain the suit and grant the relief sought therein." ***Pleasantville Taxpayers v. City of Pleasantville,*** 111 N.J.Super. 377,381-382 aff. 115 N.J.Super. 85 (A.D. 1971) ("Where the failure to

exhaust administrative remedies exists, as here, the court is without jurisdiction to entertain the suit and grant the relief sought therein"); ***Asemani v. Attorney Gen. of the U.S.***, No. 03-4059, fn.5 (3d Cir. 2005) (Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .").). Therefore, the opinion rendered on the merits and the dismissal with prejudice [27] after relinquishing jurisdiction is advisory and cannot be accepted by this Court or the N.J. Supreme Court.[28]

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[27] "Plaintiff's Complaint is dismissed with prejudice and without costs." (P34)

[28] An advisory opinion is a non-binding statement by a court or an administrator interpreting the law on a matter submitted for that purpose. See Black's Law Dictionary 1119 (7th ed. 1999). The issuance of advisory opinions by federal courts has always been prohibited because such matters do not meet the "case or controversy" requirements contained in U.S. Const. art. III, § 2, cl. 1. See Muskrat v. U.S., 219 U.S. 346, 356-57, 31 S.Ct. 250, 254, 55 L.Ed. 246, 250 (1911); Hayburn's Case, 2 U.S. 409, 410, 1 L.Ed. 436 (1792). See also Massachusetts v. Environmental Protection Agency, ___ U.S. ___, ___, 127 S.Ct. 1438, 1452, 167 L.Ed. 2d 248, 267 (2007). Notwithstanding the absence of a case or controversy standard in the State Constitution, courts in New Jersey do "not render advisory opinions or function in the abstract." Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). ***In re Determination by Director of the Division of A.B.C.***, 921 A.2d 1159 (A.D. 2007)

Petitioner's Independent Action

Petitioner filed an independent action on 4/20/06 to have the 7/21/04 judgment set aside for fraud upon the court and because it was void on its face (P 46-51). During the summary judgment motion instituted by Sparta's attorney, he made a binding judicial admission [29] in his brief [30] by admitting to arguing exhaustion in the former case.[31] That admission is consistent with the trial judge's dismissal for a lack of jurisdiction in the 7/21/04 judgment (P28-29). Therefore, both the judge and Sparta's attorney knew the 7/21/04 judgment involved a dismissal for a lack of jurisdiction, not a

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[29] "When a party has admitted to a fact, the opposing party may "dispense with proof of facts for which witnesses would otherwise be called" as to that issue, and "any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880)." ***Philadelphia Reinsurance Corp. v. Employers Insurance of Wausau,*** 61 Fed.Appx. 816 (3d Cir. 2003)

[30] Gospel Missions of America v. City of Los Angeles, 328 F.3d 548, 557 (9th Cir. 2003) (stating that court of appeals has discretion whether to treat a concession in a pleading or brief as a binding judicial admission). ***Berckeley Investment Group, Ltd. v. Colkitt***, 455 F.3d 195 (3d Cir. 2006)

[31] "Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." (P59)

merits ruling. The judge's 06/23/06 summary judgment order shows the judge dismissed the complaint on res judicata grounds and further denied petitioner's recusal motion (P1-7). In that order, the judge expressly stated; "plaintiffs complaint Docket No. L-1106-06 is barred by the doctrine of res judicata as to the same issues raised." Except, the judge knows the former complaint was dismissed for a lack of jurisdiction, which deprived the judge of jurisdiction to reach the merits. ***Pleasantville Taxpayers.*** By admitting to having argued exhaustion in the former case, the judge and Sparta's attorney knew the court did not enter a decision on the merits that could support res judicata in this case.[32] Therefore, Sparta's attorney violated judicial

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[32] ""The term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). Three elements must be met for res judicata to apply: "[1] the judgment relied upon must be valid, final and on the merits; [2] the parties in the two actions must be either identical or in privity with one another; [3] the claims [in the subsequent case] must grow out of the same transaction or occurrence." Olds v. Donnelly, 291 N.J. Super. 222, 232 (App. Div.), aff'd, 150 N.J. 424 (1997) (citing Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398 (1991)). "For the purposes of res judicata, causes of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence." Watkins, supra, 124 N.J. at 413. A litigant must present all

estoppel by arguing the 7/21/04 judgment represented a decision on the merits contrary to his own admission and the judge's dismissal for a lack of jurisdiction.

Facts Overlooked by the Appellate Division

The Appellate Division overlooked facts that prove two judicial estoppel violations and the resulting fraud upon the court.[33] In its decision, they claim to have reviewed the record, which includes the 7/21/04 judgment. Except, they overlooked the following facts.

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theories in the first action when seeking to remedy a single wrong. Ibid. ***Hawkins v. Garden State Surgical Assoc., P.A.***, No. A-3952-06T3 (App.Div. 2008)

[33] "Rather than pursuing that avenue, plaintiffs filed an inverse condemnation action in 1999. That matter was tried before Judge Bozonelis, and on July 21, 2004, he filed an order and eleven-page written opinion dismissing plaintiffs' suit. Plaintiffs filed two motions for reconsideration, both of which were denied. Plaintiffs then appealed to this court, but their appeal was dismissed for lack of prosecution. Their attempts to obtain review in the Supreme Court were also unsuccessful. In April 2006 plaintiffs filed the present action in which they assert the same claims which they unsuccessfully pressed in their 1999 suit. Defendants moved for summary judgment, which Judge Bozonelis granted. Plaintiffs have appealed from that order. **Having reviewed the record, we are satisfied the order granting summary judgment to these defendants should be affirmed** substantially for the reasons stated by Judge Bozonelis in his statement of reasons appended to the order of June 23, 2006. Affirmed." (P 10)

1. They make no reference to the unreversed 10/21/03 summary judgment order ((P12-13). Hence, they overlook the fact that petitioner is still entitled to the trial that was ended for a lack of jurisdiction, which would prove Sparta violated judicial estoppel and perpetrated a fraud upon the court by arguing exhaustion.

2. They make no refence to the fact that petitioner's current action sought to set aside the 7/21/04 judgment for fraud upon the court and for being void (P46-51). Instead they misrepresent the complaint that was presented (P46-51), as follows; "they assert the same claims, which they unsuccessfully pressed in their 1999 suit."

3. They also overlooked the fact that the trial judge dismissed the former complaint for a lack of jurisdiction for failing to exhaust administrative remedies (P28-29). Hence, it did not have jurisdiction to render a decision on the merits. ***Pleasantville Taxpayers.***

4. By ignoring the dismissal for a lack of jurisdiction, it was also able to ignore Sparta's judicial estoppel violation and fraud upon the court by arguing res judicata since there was no decision on the merits in the 7/21/04 judgment in order to support res judicata. ***Hawkins***.

5. The Appellate Division also ignored Sparta's attorney's admission that it argued exhaustion, which proves it could not argue a merits ruling existed.

Since the Apellate Division ignored petitioner's judicial estoppel argument and further ignored facts that are in the orders it reviewed, which would resulted in its sua sponte raising judicial estoppel, proves an abuse of discretion that makes its affirmation of res judicata manifestly unconscionable.

Moreover, by ignoring the foregoing facts, the Appellate Division ignored the facts that prove the trial judge denied petitioner's due process by ignoring its own previous dismissal for exhaustion in order to enter res judicata.[34]

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[34] A judgment can be voided on two grounds: (1) if the rendering court lacked subject matter jurisdiction or (2) if it acted in a manner inconsistent with due process of law. Wright & Miller, Federal Practice and Procedure § 2862. ***Construction Drilling, Inc. v. Chusid***, 131 Fed.Appx. 366 (3d Cir. 05/11/2005)

CONCLUSIONS

The foregoing shows the Appellate Division overlooked; the 10/21/03 summary judgment order, that portion of the 7/21/04 judgment that dismissed petitioner's complaint for a lack of jurisdiction, and Sparta's attorney's admission that he argued exhaustion in the former case. Had the Appellate Division not overlooked these facts it would have had to sua sponte raise judicial estoppel for the following reasons, thus proving an abuse of discretion.

1. The dismissal for exhaustion in the 7/21/04 judgment contradicts the position taken by Sparta to achieve the 10/21/03 summary judgment order.

2. The successful dismissal for exhaustion in the 7/21/04 judgment contradicts Sparta's subsequent res judicata argument since the dismissal for exhaustion provides no decision on the merits to support res judicata.

3. By overlooking an admission that shows Sparta argued exhaustion, the Appellate Division avoids a fact that proves Sparta intentionally contradicted the position taken in the 10/21/03 order and its subsequent grounds for res judicaia, thereby making affirmation of res judicata manifestly

unconscionable. Hence, Sparta's judicial estoppel violations hampered petitioner's presentation of their claims in both cases. ***United States v. Parcel of Land and Residence at 18 Oakwood Street.***

Petitioner respectfully submits that Sparta's attorney would not have twice perpetrated a fraud upon the court unless he believed Sparta did in fact take petitioner's lot for a public use. So, the conduct of the trial judge and the Appellate Division supports an inference that a judicial policy exists to intentionally deny petitioner their right to obtain compensation for a taking.

For all of the above stated reasons, this Court should grant this petition because petitioner's have been denied the trial that remains ordered in the 10/21/03 order by virtue of Sparta's judicial estoppel violations and their fraud upon the court. Hence, this Court's denial of this petition would represent a tacit approval of the fraud upon the court that was perpetrated with the assistance of New Jersey's courts, which shows their effort to conceal this

conduct represents a further breakdown in the integrity of the judicial process.[35]

CERTIFICATION

I, Nelson Fernandes, do hereby certify that this petition is presented in good faith and not for delay.

June 18, 2008 _____

Nelson Fernandes

[35] Georgia's highest court gave its tacit approval to this decision by denying certiorari. Id. ***McKnight v. Chicago Title Insurance Co., Inc.***, 358 F.3d 854 (11th Cir. 2004)